ORIGINAL

FILED
September 16 2009

Ed Smith

CLERK OF THE SUPREME COURT
STATE OF MONTANA

JAMES D. MOORE ATTORNEY AT LAW 30 5th Street East, Suite 201 Post Office Box 116 Kalispell, Montana 59903 Telephone (406) 755-8332 Facsimile (406) 755-8339

Email: moorelaw@centurytel.net

Attorney for Defendant and Appellant, JAMES R. MOSTI

FILED

SEP 1 6 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 09- BA-09-0 5 0 5

CACV OF COLORADO, LLC,

Plaintiff and Appellee,

VS.

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JAMES R. MOSTI,

Defendant and Appellant.

MOTION TO REINSTATE AND FILE APPEAL

COMES NOW the Appellant, JAMES R. MOSTI, and moves the Court for an order reinstating Appellant's filing of its appeal on September 2, 2009 as timely.

This Motion is made for the reasons and upon the grounds that said filing was timely, based upon the Montan Rules of Civil Procedure and the Montana Rules of Appellate Procedure, as set forth in the Memorandum in Support of Motion and the Affidavit of Appellant's Attorney, James D. Moore, filed herewith.

DATED: September 15, 2009.

James D. Moore Attorney) for Appellant

MOTION TO REINSTATE AND FILE APPEAL

CERTIFICATE OF SERVICE I hereby certify that I have filed a true and accurate copy of the foregoing AMENDED NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced district Court action, as follows: Charles Dendy RODENBURG U.S. Mail (first class postage) Hand Delivery 1004 East Central Avenue Bismark, ND 58501-1936 Other Attorney for Plaintiff/Appellee I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2009. Teri Ann Lawler Paralegal

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JAMES D. MOORE
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Kalispell, Montana 59903
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CLERK OF THE SUPREME COURT
STATE OF MONTANA

Attorney for Defendant and Appellant, JAMES R. MOSTI

IN THE SUPREME COURT OF THE STATE OF MONTANA Supreme Court Cause No. DA 09- [] A 0.9 - 0.5 0.5

CACV OF COLORADO, LLC,

Plaintiff and Appellee,

VS.

JAMES R. MOSTI,

Defendant and Appellant.

MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE AND FILE APPEAL

Appellant, JAMES R. MOSTI, hereby submits the following Memorandum in Support of Motion to Reinstate and File Appeal.

Under Rule 4(5)a.i., M.R.App.P., a party to a civil action has thirty (30) days from notice of entry of judgment to file a notice of appeal. Where, as here, notice of entry of judgment is "required to be filed under M.R.Civ.P. 77(d)," the 30 days shall not begin until service of the Notice of Entry of Judgment.

Under Rule 6(e), M.R.Civ.P., whenever a party is required to give notice by statute, and does so by mail, three (3) days is added to the prescribed time. The day of the filing or notice is not to be included under Rule 6(a), M.R.Civ.P. Rule 6 applies to notice of entry of judgment. Lewistown Propane Co. v. Utility Builders, Inc. (1976), 170 Mont. 292, 552 P.2d 1100.

In the case at bar, we know that the Notice of Entry of Judgment was dated July 30, 2009. We do not know when it was sent, but we know that it was not "filed"

with the District Court, as that term is used in Rule 4(5)a.i., until August 3, 2009.

Under the Rules, if the Notice was sent on July 30th, despite not having been filed until August 3rd, and was considered to have been legally effective on that date despite the lack of filing, the last day of the three days mailing time would have been Sunday, August 2nd. That is a day on which mail is not received, but it should not matter as that date should have been excluded from the period of time prescribed by the rules for the filing of an appeal in this matter under Rule 3, M.R.App.P., such that the Appellant's 30 day appeal period would have begun on Monday, August 3rd, the date the Plaintiff actually filed his Notice of Entry of Judgment.

The final day of Appellant's 30 day period during which he could appeal would have been Wednesday, September 2nd. The Appellant fax filed his Notice of Appeal to the Supreme Court on Monday, August 31st, but now understands that fax filing will not be permitted until October 1st, when the new rules become effective. The hard copy Notice of Appeal was sent the same date, and was received by the Clerk of the Supreme Court on September 2nd, which should have been the last day of the prescribed period.

Under these facts, the Appellant's Notice of Appeal should be regarded as timely and his appeal should be reinstated, such that it can be resolved on the merits.

DATED: September 15, 2009.

James O. Moore Attorney for Appellant

CERTIFICATE OF SERVICE

2 3 4	I hereby certify that I have filed a true and accurate copy of the foregoing AMENDED NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced district Court action, as follows:
5 6 7	Charles Dendy JOHNSON, RODENBURG & LAUINGER 1004 East Central Avenue Bismark, ND 58501-1936 Attorney for Plaintiff/Appellee [] U.S. Mail (first class postage) [] Hand Delivery [] Other
8	I declare under penalty of perjury that the foregoing is true and correct.
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1	Executed on September 15, 2009.
2	Teri Ann Lawler
3	Paralegal
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	MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE AND FILE APPEAL

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JAMES D. MOORE ATTORNEY AT LAW 1 FILEI 30 5th Street East, Suite 201 Post Office Box 116 2 Kalispell, Montana 59903 3 SEP 1 6 2009 Telephone (406) 755-8332 Facsimile (406) 755-8339 Email: <u>moorelaw@centurytel.net</u> 4 Ed Smith CLERK CE THE SUPPLEME SOURT STATE OF MONTANA 5 Attorney for Defendant and Appellant, JAMES R. MOSTI 6 7 IN THE SUPREME COURT OF THE STATE OF MONTANA 8 Supreme Court Cause No. DA 09- 11 A 11 9 - 1 5 0 5 9 10 CACV OF COLORADO, LLC, 11 AFFIDAVIT IN SUPPORT OF MOTION TO REINSTATE AND FILE APPEAL Plaintiff and Appellee, 12 VS. 13 JAMES R. MOSTI, 14 Defendant and Appellant. 15 STATE OF MONTANA) 16 County of Flathead 17 James D. Moore, your Affiant herein, being first duly sworn, deposes and says as follows: 18 That your Affiant is the attorney for the Appellant named herein. 1. 19 That the Court entered its Order and Rationale on Plaintiff's Motion for Summary Judgment on June 8, 2009. 2. 20 21 That Plaintiff prepared a Notice of Entry of Judgment on July 30, 2009, and subsequently filed said Notice of Entry of Judgment with the Clerk 3. 22 of District Court on August 3, 2009. 23 That your Affiant believes that he received a copy of the Notice of Entry of Judgment on August 3, 2009. 4. 24 That your Affiant faxed a copy of Appellant's Notice of Appeal on August 31, 2009 to the Supreme Court for filing, and sent the originals of the Notice of Appeal to the Court on the same day. 5. 25 26 That it was your Affiant's belief that Appellant had until September 2, 2009, within which to file his Notice of Appeal. 6. 27

AFFIDAVIT IN SUPPORT OF MOTION TO REINSTATE AND FILE APPEAL

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2	James D. Moore
3	SUBSCRIBED AND SWORN TO before me this day of sept,
4	2009.
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7	STATE OF MONITANA (Printed Name) Residing at COLUMBIA FALLS
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CERTIFICATE OF SERVICE

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9	I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2009.
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	AFFIDAVIT IN SUPPORT OF MOTION TO REINSTATE AND FILE APPEAL